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Washington, DC 20536

U.S. Citizenship and Immigration Services

B6

[redacted]

MAR 17 2004

FILE: WAC 02 025 56946 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for a Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a wholesale bakery. It seeks to employ the beneficiary permanently in the United States as a baker (French style). As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it was the successor-in-interest to the original employer named in the approved labor certification.

On appeal, counsel submits additional evidence and asserts that the petitioner has established that it is the successor-in-interest to the original employer set forth in the approved labor certification.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 20 C.F.R. § 656.30 provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. If the employer/employee relationship changes, the validity of the approved labor certification may be affected; thus, if the employer filing the preference petition cannot be considered a successor-in-interest to the employer in the labor certification, the job opportunity as described in the approved certification no longer exists because the original employer no longer exists. *See, e.g., Matter of United Investment Group,* Int. Dec. 2990 (Comm. 1985).

Eligibility in this matter turns, in part, on the petitioner's ability to establish that it is the successor-in-interest to the original employer as stated on the original labor certification. That employer was "Bread Only, Inc." It originally filed for labor certification on January 13, 1998, thus establishing the priority date of the visa petition. The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5 (d).

The current petitioner is "Just Bread, Inc. (D.B.A. Bread Los Angeles)." Counsel's initial letter submitted with the immigrant visa petition stated that Just Bread, Inc. purchased Bread Only, Inc. on August 13, 1999. Counsel stated that the type of business, location and job duties of the beneficiary remain the same. Also submitted was a copy of the purchase agreement along with tax returns of both Just Bread, Inc. and Bread Only, Inc. The street address set forth on the tax returns for both companies is identical and is located in Brentwood, Tennessee. The address of the original employer, Bread Only, Inc., as given on the approved labor certification, is in Los Angeles, California.

In a request for additional evidence dated February 9, 2002, the director instructed the petitioner to submit a copy of the petitioner's articles of incorporation. The director also requested the petitioner to submit evidence in support of its ability to pay the beneficiary's proposed salary. As stated on the approved labor certification, the beneficiary's wage offer is $12.05 per hour based on a 40-hour week or $25,064 per year. The director also advised the petitioner that its 2000 tax return contained in the record shows its business address to be in Brentwood, TN.

In response, the petitioner submitted a copy of its California Articles of Incorporation. They showed that it incorporated on August 10, 1999.

The director determined that the evidence did not establish that the petitioner had established that it is the successor-in-interest to the original employer, Bread Only, Inc. The director relied on *Matter of Dial Auto Repair Shop, Inc.,* 19 I&N Dec. 481 (Comm. 1981) and concluded that the "Asset Purchase Agreement," submitted to the record, failed to establish that the petitioner had assumed all of the rights, duties, obligations, and assets of Bread Only, Inc. The director noted that the documentation provided only showed that the petitioner bought the personal property and real property leases from the original employer.

On appeal, counsel submits a more complete copy of the asset purchase agreement and explains that the attached schedules, 1.1.1, 1.1.2, and 1.3 set forth in detail the items that the petitioner purchased from Bread Only Inc. Schedule 1.1.1 describes the personal property as including office and bakery equipment by model and quantity. Schedule 1.3 describes liabilities including equipment leases, a real property lease with "West Adams Partnership dated April 13, 1993, and a schedule of payments of the purchase price. Schedule(s) 2.3 and 2.4 describe monthly rent, property tax proration, and purchase price allocation. Although mentioned in item 1.1.2 of the agreement, there is no schedule attached to the agreement labeled "1.1.2" which lists or describes the real property leasehold interest.

Counsel asserts that there were no other relevant assets or relevant liabilities for the petitioner to acquire other than those listed in the submitted schedules. He argues that the language used in the agreement as "excluded assets" was simply boilerplate terminology. Having carefully reviewed the copy of the asset purchase agreement submitted on appeal, we would agree that it appears to consist of much boilerplate language. In fact, it completely fails to identify the specific location of the business that the petitioner bought from the Bread Only, Inc. Except by reference to a real property lease with "West Adams Parnership," which counsel did not submit, it is impossible to connect the transfer of ownership memorialized by this agreement with the same business operated at the same location set forth in the labor certification. Although counsel's contentions may be perfectly accurate regarding the petitioner's acquisition of all the relevant assets and liabilities, these assertions do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533,534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506. (BIA 1980). The record lacks any kind of simple corroboration by one of the principals involved that a complete exchange of ownership for this particular business at that specific location occurred. The successor-in-interest has the burden of proof and must show that it has assumed all the rights, duties, obligations, and assets of the original employer and continue to operate the same type of business as the original employer. *See Matter of Dial Auto Repair Shop, supra.*

Beyond the decision of the director, it is noted that the evidence contained in the record failed to establish the petitioner's continuing ability to pay the beneficiary's proffered wage of $25,064 pursuant to the provisions of 8 C.F.R. § 204.5(g)(2). While it is noted that the ability to pay was established by the net current assets or net income of either the petitioner or the original employer for the years 1998, 1999, and 2001, the record's only evidence for the year 2000 is a partial copy of the petitioner's corporate tax return showing an ordinary income of -$26,558. This is not sufficient to cover the beneficiary's proffered wage of $25,064 in that year.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.